

REMARKS

With regard to the comments provided in paragraph 1 of the Office Action, mailed April 10, 2008, it is respectfully pointed out, that in view of the fact that a Second Supplemental Appeal Brief was filed along with a Substitute Appeal Brief, that the Examiner specifically point out what is in error or apparent error with the Brief as most recently pending. Separate headings were provided in the Substitute Appeal Brief and the Second Supplemental Appeal Brief for each ground of rejection appealed. Further, no nonappealable issues can be found in the Brief. It is respectfully requested that the Examiner point out what the nonappealable issues are that the Examiner believes are discussed.

Claims 1-15 stand rejected under 35 USC 112 first paragraph for the use of the word "therethrough" in the claim. It is respectfully pointed out that this word has been in the claims through numerous Office Actions and the Appeal without objection and was not so unclear during that time as to necessitate a rejection. Additionally, the Office Action rejects claims 1-15 however claim 6 was cancelled. Regardless, "therethrough" has been deleted from claim 1 obviating this rejection. No reference can be found in the Appeal Brief (which is actually the Second Supplemental Appeal Brief) dated January 30, 2008 discussing "therethrough" and does not cite page 3, page 6 or page 7 for a discussion of "therethrough". Clarification is requested.

Claims 34-39 and 41-44 stand newly rejected under 35 USC 102(b) as being anticipated by *Rochlis*. The Examiner cites to several sections of *Rochlis* in support of the *Rochlis* structure being an integral unitary molded article formed from a thermoplastic polymer. However, the sections cited to on page 5 of the Office Action regarding *Rochlis* do not make it clear if the alleged different components are within a single product or that the differences are

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product-to-product but it appears the disclosure is directed to product-to-product differences. Further, given the entire disclosure, it is not clear what is “integrally molded”. *Rochlis* forms a structure by roll forming a sheet of material or in the alternative, it appears that the method disclosed regarding Figure 19 melts a polymer and deposits the melted polymer on a drum having mold cavities thereon. *Rochlis*, in the disclosure relating to Figs. 15-16 and columns 10-12, discuss the use of laminated sheets to form products which are not the defined integral molded structures. Further, it is not clear how different polymers can be provided in a single item using the processes disclosed nor has the Examiner pointed out how this can be achieved. There is a disclosure regarding the process depicted in Figure 19 of laminating two polymers together in the forming process, one being a backing 128, one being a front layer bonded thereto. This is not the integral molded structure as defined in claim 34 and the claims depending therefrom. Additionally, it is pointed out that it is not clear how different colors are achieved in the *Rochlis* structure. It could be that the colors are actually the same but visually appear different because of the thickness or some other physical characteristic of the formed projections at least in the cited sections referred to by the Examiner. For this reason alone, each and every element of claim 34 is not disclosed by *Rochlis* and therefore the anticipation rejection fails. Thus, each and every element defined in claim 34 (and the claims depending therefrom) does not appear to be present in the *Rochlis* structure and thus *Rochlis* will not support an anticipation rejection.

It is noted here that the dependent claims, those claims depending from claims 1 and 34, solely for simplifying the arguments herein, are conceded to rise or fall with the patentability of the independent claims 1 and 34. Thus, these claims will not be discussed in detail in this response.

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It is pointed out here again, that a fundamental underlying distinction of the present invention over all the cited references is that the present invention is defined as an integral molded structure. This limitation is present in all claims. The argument presented in the briefs and prior responses to Office Actions are reiterated herein by reference. It is pointed out, that in a process or a product-by-process claim, process steps for example, forming, coloring, reacting have an action verb stating the process steps and ending in an “ing” not an “ed”. Molded is a physical structural limitation as are bolted, welded, woven, etc. The contested phrase, at least in claims 1 and 34 is “an integrally molded thermoplastic structure”. This phrase in its composite form is structural, not process. The Federal Circuit in *Miken Composites v. Wilson Sporting Goods Company* (case no. 2006-1628 decided February 6, 2008) discussed the use of functional/process related terms to define structure. The court held “That this ordinary meaning has functional attributes does not change the fact that the claim recites a structural component, albeit one possessed with certain understood characteristics”. The court approved the use of the term “insert” as a structural component despite its functional/process attributes. Contrary to the Examiner’s contention, Applicant did not concede that molded is both a process and structural term. Molding is a process term, molded is a structural term. In fact, molding can be both a process term and a structural term as found in the dictionary and was referred to in prior responses. One should and must look to the context of use of a word to determine its meaning. *Rochlis* does not disclose such a structure as do any of the other references of record. The Examiner appears to concede this point to Applicant and rather argues that the claim is a product-by-process claims. At best, *Rochlis* discloses a laminating process or a laminated structure where two layers are fused together or otherwise joined together. Given the disclosed process, it appears that *Rochlis* could not make the present invention.

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Claims 1-5, 7, 9-13, 15, and 47 stand rejected under 35 USC 103(a) as being unpatentable over *Rochlis* in view of *Akeno*. Both these references are newly cited. As discussed above, it is submitted that *Rochlis* does not disclose an integral molded article as contended by the Examiner. It is at least principally directed to a laminated structure. It is not clear where in *Rochlis* it is disclosed that the projecting elements can have different colors or different polymers in a projecting element. Further, it is not clear in the rejection of these claims whether *Akeno* is being modified by the teaching of *Rochlis* or *Rochlis* is being modified by the teaching of *Akeno*.

Akeno adds nothing to the teaching of *Rochlis* since the projecting elements of *Rochlis* would still have a core portion, a terminal part and a surface of the same material. Neither reference teaches a projecting element wherein the core portion is formed of the first polymer material and the surface portion is formed of the second polymer material obviating any support for an obviousness rejection.

Akeno is directed to making the projecting elements more resistant to bending over. This is done by increasing the moment of inertia of the projecting elements by adding material adjacent the base of the projecting elements. There is no direction in *Akeno* to form the defined projecting elements nor can any disclosure be found in *Rochlis* of such a structure so even if combined, the present invention is not taught. So, even if the projecting elements of *Rochlis* have the structure of *Akeno* (or vice versa), the defined invention would not result. Again, it is not clear in *Rochlis* how different polymers are employed other than perhaps in a mat-to-mat format and not within a single mat or by having a laminated backing layer. Additionally, since there is a lack of teaching of such a combination to produce the present invention, it appears that the obviousness rejection is based on the Examiner's personal knowledge. An affidavit pursuant to 37 C.F.R. 1.104(d)(2) is respectfully requested to substantiate the Examiner's personal

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knowledge. There is no addressing in the rejection of the product-by-process limitations set forth in claim 47. It is submitted therefore that the required reasoning and rationale for the rejection of claim 47 is not provided. Regardless, the above arguments apply to claim 47 as well.

Claims 8, 40, 45-46 stand rejected as being obvious over *Rochlis* in view of *Akeno* and in further view of *Clune*. As stated above, for the purposes of this response, the patentability of these claims are considered to be based upon the patentability of the independent claims from which they depend.

Claims 1, 3, 5, 7, 8, 10-12, 34-40, and 42-44 stand rejected as being anticipated under 35 USC 102(e) over *Sallee*. It is assumed that the rejection is actually a 35 USC 102(b) rejection given the date of the reference. These claims are also rejected in the alternative under 35 USC 103(a) as being obvious over *Sallee*. The crux of this rejection appears to be contained at page 10 of the Office Action. The Examiner states that *Sallee* teaches that the attachment of the projecting portion to the base portion may be permanent and then the Examiner says a structure that is permanently bonded (with no cite to the disclosure where “bonded” is taught) is an integral structure whereas in the immediately preceding sentence, the Examiner says that the attachment is permanent but does not mention bonded. Bonded typically means that the once separate parts are in some manner adhered together. In the case of *Sallee*, only a mechanical interlock is specifically disclosed which might be the disclosed “permanent” attachment. In further explanation in support of the rejection, the Examiner gives no credence to the fact that the independent claims define that the structure is an integrally molded thermoplastic structure. This has been discussed in great detail in prior responses and in the Appeal Briefs. Those comments are reiterated herein. It appears from the structure of the Office Action, that this comment relates only to those claims which relate to independent claim 34 and not to claim 1 and its depending

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claims. It is noted here, that the rejection is an anticipation rejection, not an obviousness rejection in the first instance. The claimed structure is not found in the disclosure of *Sallee*. The Examiner has not provided any explanation of the basis for the obviousness rejection as required. It is again pointed out that the rejected claims are not product-by-process claims, do not use any process related word in an “ing” form, i.e., the claims do not say molding, they say a molded product which is structural as are bolted, glued, welded, etc. This provides for an economy of words and oftentimes, it is difficult to define a product for example molded. Molded generally means that the part is a continuum of the material making up the product without interfaces, glue joints or the like in the molded structure.

On page 11 of the Office Action the Examiner contends that the U.S. Patent & Trademarks Office is of the opinion that when prior art discloses a product which reasonably appears to be either identical whether only slightly different than a product claimed in a product by process claim, a rejection based alternatively on either §102 or §103 is “eminently fair and acceptable”. The issue is not “fairness” or “acceptability”. The issue is whether or not the references will support the rejection. In this case, the identical structure is not disclosed by *Sallee* as required and therefore *Sallee* will not support an anticipation rejection. *Sallee* is assembled by mechanical interlocking of the projecting elements to a base sheet and is in no way an integral molded structure. Using other than a mechanical interlock would defeat the purpose of *Sallee*. There is no disclosure of what the permanent securement might be and therefore, *Sallee* does not enable its own disclosure as required. The *Sallee* structure may contain molded parts but the integral structure is not of a molded structure as defined in the claims. The Examiner, on page 10 of the rejection states “The instant claims are drawn to a product and not to how the product is made”. Thus, the Examiner concedes Applicant’s position. With regard to

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the obviousness rejection, the Examiner has not stated what *Sallee* does not teach and where that failure to teach or disclose is made up in the prior art. This is an inappropriate and incomplete rejection.

Claims 2 and 4 stand rejected as being obvious over *Sallee*. In order to simplify this proceeding Applicant, for the sole purpose of expediting prosecution, concedes that the patentability of claims 2 and 4 stand or fall on the patentability of claim 1.

Claims 13 and 45 stand rejected as being obvious over *Sallee* in view of *Rawlinson*.

For the same reasons stated immediately above, the patentability of claims 35 and 45 rise or fall on the patentability of claims 1 and 34.

Claims 14 and 46 stand rejected as being obvious over *Sallee* in view of *Sesselmann*. For the same reasons stated immediately above, Applicant concedes that the patentability of claim 14 and 46 rise or fall on the patentability of claims 1 and 34.

In paragraph 10 of the Office Action, the Examiner incorrectly states that claim 47 had been cancelled. Claim 47 was not cancelled nor was it contended that claim 47 was cancelled. It was merely stated that the claim 47 had been contended as being rejected by the Examiner in prior Office Actions prior to its having been presented to the U.S. Patent & Trademark Office. It is noted that claim 47 stands rejected in the current Office Action.

It is pointed out again, regarding all the rejections, that they are inappropriate. All claims in a rejection are lumped together and all the claimed elements are not individually discussed. This issue was discussed in prior responses and those comments are reiterated herein by reference.

With regard to the Examiner's comments in paragraph 11, the following comments are provided. The claims do not recite integrally molded. The claims state that the structure is "an

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integrally molded thermoplastic structure". This is not a product-by-process claim. It is a structural claim. Similar language has been approved by this Examiner in prior issued patents without objection. Importantly, the Examiner concedes that the prior art products are not formed by integrally molding, a point lost in the rejection of claim 47. (The Examiner states a laminated structure can be formed by coextrusion, this is disputed since separately formed layers are not joined together.) Thus, the art structure can't be an integrally molded structure and thus, many of the rejections fail on this basis alone. *Sallee* does not disclose permanently bonded, but rather permanent attachment. A permanently bonded structure is different than an integrally molded structure, there is no continuum of the polymer between the once separate parts. Permanently bonded has an interface between two or more layers. Integrally molded has no interface between the various portions that are joined together providing a continuum of material. In fact, it would appear that the *Rochlis* structure and the *Sallee* structure could not meet their goals by being an integrally molded structure. *Rochlis* in some executions requires a plurality of layers joined together after their formation. *Sallee* requires the removability of their projecting elements with the exception of the one phrase permanently attached. It is unclear what permanently attached means nor is such a structure enabled. These are the two principal references relied upon by the U.S. Patent & Trademark Office. There are structural differences between bonded or attached and integrally molded structures. A welded part is different than a part that is cast to form the various joined parts. Casting provides a continuum while a welded part has a weld between two or more components of the part. They are structurally different. If one were to review a food product, there is a cooked food product and an uncooked food product. They can be immensely different in make up, texture, shelf life, nutrition, etc. To say that a cooked green bean is the same as a green bean is fallacious or that cooked dough and dough are the same. They are

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structurally different products even though it comprises the same basic beginning components. Diamond, graphite and carbon have the same chemical composition but pressurized and heated carbon can form diamonds which is an abrasive and graphite is a lubricant providing immensely different properties than its component processed carbon. Oftentimes it is difficult to describe a product without using such terms as welded, molded, glued and bolted, points well known by those skilled in the respective art. An Examiner could not seriously argue that a bolted structure is not a structural product even though it was assembled by bolting parts together.

In paragraph 12 of the Office Action, the Examiner opines that it is not clear what relevance other patents examined by the Examiner have on this case. As is pointed out in the Appeal Brief, the actions taken in this case are arbitrary and capricious violating the Due Process Clause of the constitution and the Administrative Procedures Act. The Examiner might want to consult with the Solicitor's office on this issue. Structural terms that also can be process step terms in the "ing" form are commonly used in patents and have not been objected to by this Examiner. These comments presented in prior responses on this issue are reiterated herein by reference.

With regard to paragraph 13 of the Office Action, the Examiner discusses *Sallee*. It is the Examiner's position that because projections may be permanently "bonded" (attached) to the base, that that is an integral structure. That may or may not be true depending on what was meant by "attached" by those inventors which is not disclosed. The issue here is whether or not it is an integral molded thermoplastic structure, not an integral structure. Interestingly, the Examiner in this paragraph of the rejection and in several other places treats integral molded structure as a structural term.

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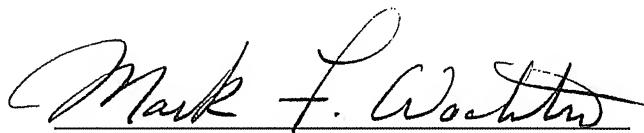
It is noted with appreciation that certain previously applied references have been withdrawn because Applicant's arguments were found persuasive. The current rejections are in apparent contradiction to this concession, particularly regarding Applicant's characterization of the Zuiddam, et. al. reference in prior responses.

Based on the foregoing, it is again submitted that the claims are in a condition for allowance and formal allowance of said claims is respectfully solicited.

If any issue regarding the allowability of any of the pending claims in the present application could be readily resolved, or if other action could be taken to further advance this application such as an Examiner's amendment, or if the Examiner should have any questions regarding the present amendment, it is respectfully requested that the Examiner please telephone Applicant's undersigned attorney in this regard.

Respectfully submitted,

Date: July 8, 2008



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